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Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY; CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioners,

vs.

KAM SHING CHAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether section 5310 of the Housing and Community Development Act of 1974 (the "HCDA"), 42 U.S.C. § 5301 et seq., one of approximately sixty statutes incorporating the Davis-Bacon Act procedures for enforcement of prevailing wage requirements, creates a private right of action under 42 U.S.C. § 1983?

2. Whether a private, community based, not-for-profit corporation fairly becomes a state actor by simply contracting with a municipality at a price for labor, a so-called "Person Day Rate," set by the municipality so low as to preclude payment of prevailing wages?

3. Whether a municipality exercising federally delegated authority to determine that prevailing wage requirements do not apply engages in federal, but not state, action when it contracts for private labor to be paid below prevailing wages?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Chinese-American Planning Council, Inc. ("CPC"), a private, community based, not-for-profit corporation[1]; co-petitioners, the City of New York (the "City") and the Department of Housing Preservation & Development of New York City ("HPD"); and respondents, the below named former participants in CPC programs.[2]

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[1] Petitioner CPC has no parent companies or subsidiaries to list pursuant to Rule 29.1.

[2] Kam Shing Chan, Kam Tai Chan, Jing Ye Chen, Shan Non Chiu, Bak Lok Chu, Kok Kun Chu, Israel Gonzalez, Sui Bin Huang, Jian Ning Jiang, Kam Fai Kwok, Moon Shuen Kwong, Wei Xiang Lee, Yang I Lee, Young Shi Lee, Bing Zhao Li, Hao Hui Li, Kei Man Li, Wai Tai Li, Chi Kwong Liu, Jack Ye Louie, Sheng Hua Lu, Tian Guang Mai, Cheuk Mink Ng, Kin Chung Ng, Kin Hin Ng, Shun Gao Shen, Ten Jen Shen, Hau Wing Sin, Vein Dinh Sintruong, Wing Shing Tse, Wai Man Wan, Kong Htyan Wu, Xu Ming Wu, Guo Xuan, and Yue Nam Zhu.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY; CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioners,

- v. -

KAM SHING CHAN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner CPC respectfully prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit upholding respondents' claims under 42 U.S.C. § 1983 entered in the above entitled proceeding on July 26, 1993.[3]

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[3] Pursuant to Rule 12.2 of the Court's Rules, CPC must petition separately from the City. While it argues herein, as does the City, that the comprehensive Davis-Bacon Act pro-

(continued...)

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is not reported and is reprinted in the Appendix hereto at A1.[4] The Opinions of the District Court for the Southern District of New York are reported at 797 F. Supp.

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[3] (...continued)
cedures expressly adopted in section 5310 of the HCDA preclude a private section 1983 action and that respondents have no federal "right" to be paid prevailing wages, CPC separately argues that it cannot be subject to section 1983 liability because, as a private contractor, it engaged in no state action or, *alternatively*, the City, in contracting with CPC, acted as a federal agent exercising federally delegated authority. In this case, CPC has cross-claimed against the City based on respondents' allegations that the City abrogated its duty to have CPC pay prevailing wages.

[4] Citations to the Appendix filed herewith are indicated in parenthesis with an "A" followed by the page number(s). Citations to the Joint Appendix below are indicated in parenthesis, not preceded with an "A" followed by the page number(s).

1153 and 803 F. Supp. 710 and are reprinted in the Appendix hereto at A26 and A79. The Opinion of the magistrate judge is not reported and is reprinted in the Appendix hereto at A96.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit of which review is sought was entered on July 26, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Section 5310(a) of the HCDA, 42 U.S.C. § 5310(a), provides in pertinent part:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5). . . . The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in

Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

42 U.S.C. § 5311(a), (b) provides in pertinent part:

(a) If the Secretary [of Housing and Urban Development] finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary, until he is satisfied that there is no longer any such failure to comply, shall:
(1) terminate payments to the recipient under this chapter, or
(2) reduce payments to the recipient under this chapter by an amount equal to the amount of such payments which were not expended in accordance with this chapter, or
(3) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply.

(b) (1) In lieu of, or in addition to, any action authorized by subsection (a) of this section, the Secretary may, if he has reason to believe that a recipient has failed to comply substantially with any provision of this chapter, refer the matter to the Attorney General of the United States with a recommendation that an appropriate civil action be instituted.
(2) Upon such a referral the Attorney General may bring a civil action in any United States district court having

venue thereof for such relief as may be appropriate, including an action to recover the amount of the assistance furnished under this chapter which was not expended in accordance with it, or for mandatory or injunctive relief.

The Davis-Bacon Act, 40 U.S.C. §§ 276a(a), 276a-1 and 276a-2, provides in pertinent part:

> The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing . . . ; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers . . . the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, . . . and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of

wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics . . . .

40 U.S.C. § 276a(a).

Every contract within the scope of sections 276a to 276a-5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

40 U.S.C. § 276a-1.

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of

persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a-5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

40 U.S.C. § 276a-2.

The Reorganization Plan Numbered 14 of 1950, 5 U.S.C. Appendix, provides in pertinent part:

In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for

> the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable. . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

DOL regulations at 29 C.F.R. Parts 1 and 5 (1974) are too lengthy to be set out verbatim and are reprinted in the Appendix hereto at A121.

STATEMENT OF THE CASE

This case presents an important issue of first impression of whether a private

right of action under section 1983 exists to enforce a purported substantive "right" of laborers and mechanics to be paid prevailing wages under 42 U.S.C. § 5310.

A. The Present Lawsuit

Respondents filed this action for declaratory relief, damages and attorneys' fees under 42 U.S.C. § 1983 alleging that CPC violated section 5310 of the HCDA by failing to pay prevailing wages for their performance of federally funded construction work on City-owned real estate pursuant to three annual contracts entered into by CPC with New York City's Department of Housing Preservation and Development ("HPD") between 1986 and 1989 (the "Contracts"). (29). Respondents also assert section 1983 claims against the City and HPD, and are seeking class certification. (739).

CPC moved to dismiss respondents' section 1983 claims, pursuant to Fed. R. Civ. P. 12(b)(6), because section 5310 does not create privately enforceable federal "rights" under section 1983 and CPC did not act "under color" of state law. (45). CPC also moved to dismiss respondents' claim that they had an implied private right of action directly under section 5310. The City made a similar motion to dismiss. (48).

The magistrate judge recommended that the respective motions be granted in their entirety. (A107). The District Court declined to follow the magistrate judge's recommendation, in part, by upholding respondents' section 1983 claims. (A77).[5] On September 8, 1992,

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[5] The District Court followed the magistrate judge's recommendation to dismiss respondents' claim directly under section 5310. (A77).

the District Court certified an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), of that portion of the decision refusing to dismiss the section 1983 claims. (A79).

On July 26, 1993, after granting an interlocutory appeal (A25), the Second Circuit affirmed the District Court's decision in all respects. (A3). It "conclude[d] that under either the Wilder analysis or, to the extent that it differs, the Suter analysis, § 5310 provides these plaintiffs with a right that is sufficiently clear to be enforceable under § 1983." (A17).[6]

Federal subject matter jurisdiction is pursuant to 28 U.S.C. §§ 1331 and 1337.

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[6] The Second Circuit, applying Cort v. Ash, 422 U.S. 66 (1975), also affirmed, on respondents' cross-appeal under Fed. R. Civ. P. 54(b), the District Court's final judgment (A93) dismissing respondents' claim directly under section 5310. (A11-14).

B. Statement Of The Facts[7]

CPC provides work, training, day care, elder care and other needed social services primarily to members of the Chinese-American community in New York City. Respondents performed construction and rehabilitation work for CPC, and received training from CPC in English and other vocational skills, pursuant to the Contracts. The Contracts were funded by federal grants under the HCDA provided directly to the City. The City then contracted with CPC for its services through its appropriate agency, HPD.

Each Contract contained contractual provisions required by the HCDA and applicable federal regulations. One such provision, entitled "Federal Supplemental Terms and Conditions," stated:

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[7] For purposes of this petition, all of the allegations of respondents' complaint have been taken as true.

> The Contractor acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations, including, but not limited to, those set forth in Exhibit F attached to this Agreement.

(1986-87 Contract, Art. 18, ¶ 18.1) (89).

Exhibit F to the Contract included the prevailing wage stipulation required under the HCDA and the Davis-Bacon Act:

> The Davis-Bacon Act: In construction contracts involving an excess of $2000, unless exclusively in connection with the rehabilitation of a structure designed for residential use by less than 8 families, all laborers and mechanics must be paid at a rate not less than those determined by the Secretary of Labor to be prevailing for the locality, which rates are annexed hereto as Exhibit A. These wage rates are a federally mandated minimum. . . .

(1986-87 Contract, Exhibit F, Art. 3(b)(i)) (129).

Each Contract was awarded based upon responses to HPD's Requests for Proposals ("RFPs"). The RFPs, which were

incorporated in the Contracts, contained a "Person Day Rate," used by HPD to set the total contract price. For example, the RFP for the 1986-87 Contract stated:

> A Person-Day Rate, which shall be all inclusive of costs within each Proposal, will be the proper method of establishing the overall budget. For example, if $75.00 is the Person-Day Rate, all costs to run the program, pay the staff and trainees and provide training equipment and administrative services would be covered by said rate multiplied by the number of trainees multiplied by the number of days worked.

(1986-87 RFP, General Guidelines ¶ 1) (185). This RFP also provided that "[t]here shall be 246 work days in the term of the Contract" (id. ¶ 6), and that "[a] maximum Person-Day Rate is being set at $90.00" (id. ¶ 2). The Contract prohibited CPC from receiving any additional funding for "Program Work performed pursuant to this Agreement." (1986-87 Contract, Art. 15, ¶ 15.2) (89).

CPC received the 1986-87 Contract with a budget calling for 30 trainees working 246 days (i.e., 7,380 "Person Days") at the $90 "Person Day Rate," with a total contract price of $664,200. The Person Day Rates for the 1988 and 1989 contracts, awarded to CPC, were unilaterally set by the City at $95.

Annexed by HPD to the Contracts were prevailing wage schedules below the then current prevailing wage rates as determined by the DOL. CPC did not pay respondents prevailing wages (or even at the annexed wage rates) in accordance with the direction of the HPD as expressed by the "Person Day Rate" set by HPD. HPD, which unilaterally set the "Person Day Rate," thus breached its duties under the HCDA and the Davis-Bacon Act by misleading CPC to believe that prevailing wages did not have to be paid and by not providing CPC with the means

to pay prevailing wages under the Contracts.[8]

REASONS FOR GRANTING THE WRIT

Petitioner has set forth above three important questions of federal law, any one of which meets the standard for certiorari set forth in Rule 10.1(c) of the Rules of this Court. Petitioner urges this Court to further define the limits of its section 1983 jurisprudence in a case of first impression arising under section 5310 of the HCDA, as well as to now decide, in the context of section 5310 and federal housing policy,

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[8] Respondents' alleged prevailing wage violations are the subject of a United States Department of Labor ("DOL") ruling finding that CPC committed prevailing wage violations and requesting restitution for alleged back wages due. (766). CPC filed a written response requesting withdrawal of the ruling and an administrative hearing pursuant to 29 C.F.R. § 5.11(b), (c) (1992). (864). To date, the DOL has not decided this matter.

the question it previously left open in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981) -- namely, whether the Davis-Bacon Act creates a private right of action, albeit asserted procedurally here under section 1983, to enforce a contract that contains specific Davis-Bacon Act prevailing wage stipulations.

The Court's decision, if certiorari is granted, may finally determine an employee's right to assert a private right of action under section 1983 pursuant to the approximately sixty federal statutes expressly adopting the Davis-Bacon Act procedures for the determination and enforcement of federal prevailing wage requirements. A list of these Davis-Bacon Related Acts is contained at 29 C.F.R. Part 1, App. A (1992). Ten of these Acts utilize these procedures to enforce the identical

"shall be paid [prevailing] wages" or similar language used in section 5310.[9]

The Second Circuit's Opinion permitting a section 1983 action here conflicts, moreover, with numerous decisions of this Court. See Rule 10.1(c). This Court has steadfastly refused to permit section 1983 actions where an "elaborate" and "'comprehensive enforcement scheme'" "demonstrate[s]

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[9] See the National Foundation on the Arts and Humanitarian Act of 1965, 20 U.S.C. § 954(n); Elementary and Secondary Education Act, 20 U.S.C. § 1232b; Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(e)(a); Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5); Headstart, Economic Opportunity, and Community Partnership Act of 1974, 42 U.S.C. § 2992a; Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Energy Conservation and Production Act, 42 U.S.C. § 6881(h); Solid Waste Disposal Act, 42 U.S.C. § 6979; Domestic Volunteer Services Act of 1973, 42 U.S.C. § 5046; and Emergency Community Facilities Act of 1970, 42 U.S.C. § 3107. (Reprinted at A112-121).

congressional intent to preclude the remedy of suits under § 1983," Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14, 20 (1981) (citation omitted); and where the statute does not "unambiguously confer an enforceable right upon the Act's beneficiaries." Suter v. Artist M., 112 S. Ct. 1360, 1370 (1992).

Yet, precisely because the HCDA does not provide for a private right of action, the Second Circuit has now authorized section 1983 as a procedural device to recover allegedly owed prevailing wages post-contract and to take advantage of the remedies provided under section 1983, thus vitiating the carefully crafted judicial and administrative enforcement scheme under section 5310. Except for the narrow private remedy to recover on the payment bond permitted by the Miller Act of 1935

("Miller Act"), 40 U.S.C. § 270a et seq., incorporated in the Davis-Bacon Act at 40 U.S.C. § 276a-2(b), the Davis-Bacon Act regulatory scheme does not provide for a private remedy to recover back wages. Section 5310, which does not incorporate the Miller Act, is to be enforced, by its express terms, only under the comprehensive Davis-Bacon Act regulatory scheme, the procedural provisions of the Reorganization Plan Numbered 14 of 1950 ("Reorganization Plan"), 5 U.S.C. App., and by civil action of the Attorney General of the United States under 42 U.S.C. § 5311(b). Thus, by the knowing and significant Congressional omission in section 5310 of any private remedy akin to the Miller Act or otherwise, the Congressional balancing of contractor and employee interests served by the Davis-Bacon Act administrative and enforcement schemes, and the sound public policy of

preventing piecemeal private litigation from disrupting badly needed urban rehabilitation, Congress affirmatively withdrew any section 1983 remedy in enacting section 5310.

In conflict with the general principles set forth in Rendell-Baker v. Kohn, 457 U.S. 830 (1982), the Second Circuit also has transformed CPC, a private, community based, not-for-profit corporation, into a state actor for no other reason than that CPC contracted with the City at the "Person Day Rate," which is nothing more than a calculation used by the City to determine an overall contract price. By relying on the "Person Day Rate" being set sufficiently low, that after payment of expenses, CPC could not afford to pay allegedly owed prevailing wages, the Second Circuit has improperly turned section 1983 on its head (i.e., because the "Person Day Rate" resulted in

a purported prevailing wage violation, section 1983 state action by CPC necessarily exists).

Finally, as this Court has previously recognized in a different context, the City here acted solely as a federal agent in contracting with CPC by exercising its federally delegated authority to expend HCDA block grant funds in accordance with pervasive and detailed federal regulations, including a provision requiring payment of prevailing wages. See Dixson v. United States, 465 U.S. 482 (1984). CPC in simply contracting with the City did not act "under color" of state law, thus precluding any action arising under section 1983.

For all of these reasons, certiorari should be granted.

I.

THE OPINION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN SEA CLAMMERS AND COUTU BY HOLDING THAT PAYMENT OF PREVAILING WAGES UNDER SECTION 5310 OF THE HCDA IS PRIVATELY ENFORCEABLE UNDER SECTION 1983

No private section 1983 claim exists where an "elaborate" or "'comprehensive enforcement scheme'" "demonstrate[s] congressional intent to preclude the remedy of suits under § 1983." Sea Clammers, 453 U.S. at 14, 20 (citation omitted) (foreclosing a § 1983 action under the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972); see also Smith v. Robinson, 468 U.S. 992 (1984) (foreclosing any § 1983 remedy under the Education of the Handicapped Act); accord, Suter, 112 S. Ct. at 1368 n.11; Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 521 (1990).

"The key to the inquiry is the intent of the Legislature." Sea Clammers, 453 U.S. at 13. The considerations in determining congressional intent are:

> We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

Id.

A. Section 5310's Explicit Adoption Of The Davis-Bacon Act's Comprehensive Scheme Precludes Any Section 1983 Private Right Of Action

Congressional intent to preclude any private enforcement of section 5310 under section 1983 is unmistakable for the following reasons:

- Congress' express incorporation of the Davis-Bacon Act's comprehensive administrative and enforcement scheme into the HCDA.

- The failure of Congress to incorporate in the HCDA the Miller Act's

limited private right of action for employees to sue on a payment bond pursuant to Davis-Bacon Act contracts.

- The long-recognized Congressional intent to balance contractor and employee interests solely through the Davis-Bacon Act administrative scheme.

This carefully crafted enforcement scheme, which excludes private action, serves an important public policy -- to prevent the disruption of national housing policy by a multiplicity of private suits.

Section 5310 could not be any clearer:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality *as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a - 276a-5). . . . The Secretary of Labor shall have, with respect to such labor standards, the authority and*

functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

42 U.S.C. § 5310(a) (emphasis added).

Congress thus intended that the Secretary of Labor shall determine prevailing wage rates "in accordance with the Davis-Bacon Act," and that the payment of wage rates "with respect to such labor standards" is to be enforced through the comprehensive mechanism authorized for the Davis-Bacon Act in "Reorganization Plan Numbered 14 of 1950" and the Copeland Anti-Kickback Act of 1934, 40 U.S.C. § 276c. It unequivocally adopted the Davis-Bacon Act procedures for wage determination and administrative enforcement.[10]

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[10] Section 5310, by expressly adopting the Davis-Bacon Act procedures, is one of approximately sixty statutes "collectively referred to as 'Davis-Bacon Related Acts.'" Janik Paving & Constr., Inc. v. Brock, 828 F.2d 84, (continued...)

In expressly referencing the Reorganization Plan, Congress likewise must have adopted that Plan's underlying purpose to "assure consistent and effective enforcement" of labor standards under federal and federally assisted public works contracts. Message of the President, 5 U.S.C. App.; see also Coutu, 450 U.S. at 783. As stated in the Reorganization Plan itself, consistency was to be gained through DOL administrative regulations and investigations:

> In order to *assure coordination of administration and consistency of enforcement of the labor standards provisions* of each of the following [Davis-Bacon Related] Acts by the Federal agencies responsible for the administration thereof, *the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures,* which shall be

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[10](...continued)
86 (2d Cir. 1987). The consistent enforcement of all of these Davis-Bacon Related Acts is now subject to dispute and doubt based upon the Second Circuit's Opinion.

> observed by these agencies, and *cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards*, as he deems desirable. . . .

5 U.S.C. App. (emphasis added). The Reorganization Plan notably does not provide for a private action by employees to recover back wages.

As recognized by this Court, therefore, prevailing wage determination and enforcement under the Davis-Bacon Act and the Reorganization Plan are accomplished through administrative procedures. Coutu, 450 U.S. at 759-61. This conclusion as to the HCDA is reinforced by the Congressional omission from the language of section 5310 any private right of action and even refusal to incorporate the Miller Act, which grants to other Davis-Bacon laborers the right to bring a limited private action for any deficient back wages against a contractor

on the payment bond required as a condition to the federal contract where government withholding of contract funds is insufficient. Id. at 758.[11]

The Court's statement in Coutu as to the Davis-Bacon Act thus applies with equal force here:

> 'when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.'

Id. at 773 (holding that Congress did not intend to provide a private remedy under the Davis-Bacon Act greater than that under the Miller Act) (citation omitted).

The fact that Congress did not intend to create any private right of action is further buttressed by the fact that the decision to commence an action in federal court under the HCDA is expressly granted

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[11] Unlike a federally assisted contract as is the case here, contractors contracting directly with the federal government must post a Miller Act payment bond. 40 U.S.C. § 270a(a)(2).

solely to the U.S. Attorney General. See 42 U.S.C. § 5311 and pp. 43-45 infra.

In addition, the Second Circuit has disregarded the express statutory language of the Davis-Bacon Act, incorporated in section 5310, which provides for insertion into federal contracts of provisions requiring payment of prevailing wages and providing strictly administrative penalties for failure to pay prevailing wages. Thus, each contract must contain a provision that if the contractor fails to pay the prevailing wages specified in the contract, the government may withhold payments to pay the laborers and mechanics the difference between the contract wages and those actually paid. Coutu, 450 U.S. at 757; see 40 U.S.C. § 276a(a). The Davis-Bacon Act "authorizes the Comptroller General to pay these accrued payments directly to

laborers and mechanics." Coutu, 450 U.S. at 758; see 40 U.S.C. § 276a-2(a). Furthermore, if a contractor fails to pay the stipulated wages, "the contract may be terminated and the contractor debarred from all Government contracts for a period of three years." Coutu, 450 U.S. at 759; see 40 U.S.C. § 276a-1, § 276a-2(a).[12]

The Davis-Bacon Act's (and thus the HCDA's) prevailing wage standards are therefore enforced by mandating inclusion of certain clauses in each contract, authorizing the withholding of funds and the payment of these amounts directly to the workers, and providing for contract

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[12] In accordance with the Davis-Bacon Act and the HCDA, insertion of contractual provisions requiring payment of prevailing wages, withholding, and contract termination and debarment are expressly provided for in the DOL's regulations under the Reorganization Plan. See 29 C.F.R. § 5.5 (1974) (1992).

termination and debarment. Thus, Congress expressly adopted in section 5310 an administrative and enforcement scheme whereby employees would receive proper prevailing wages while contractors would know their wage obligations in advance of contracting. See Coutu, 450 U.S. at 782.

B. The Second Circuit's Opinion Destroys The Davis-Bacon Act's Balance Of Contractor And Employee Interests In Conflict With Coutu

In Coutu, this Court held that a private right of action would destroy the Davis-Bacon Act's elaborate enforcement scheme and congressional balancing of interests between contractors and employees. 450 U.S. at 782-83. For this reason, the Court concluded that the Davis-Bacon Act does not confer on laborers a private right of action for back wages under a contract which had been administratively determined not to

call for Davis-Bacon work and thus does not contain prevailing wage stipulations. Id. The Court did "not decide whether the Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations . . . [but] recognize[d] that some of our reasoning arguably applies to the question whether the Act creates *any* implied right of action." Id. at 769, 769 n.19.

The Second Circuit below, however, expressly rejected CPC's reliance on Coutu, stating:

> *First*, the conclusion that a direct action may not be brought to enforce Davis-Bacon rights where it had been administratively predetermined that Davis-Bacon did not apply would not be persuasive authority for even the proposition that no *direct* action may be brought to enforce a contract that expressly requires the payment of wages at Davis-Bacon levels. . . . *Second*, Coutu's concern for the contractor's need to know in advance its labor costs is not an issue here, since the Contracts expressly required the payment of wages at Davis-Bacon

> levels. Finally, and most importantly, Coutu concerned only whether the action could be brought directly under Davis-Bacon, not whether it could be brought under § 1983.

(A20-21).

Thus, the Second Circuit not only ignored the general applicability of Coutu's "reasoning" beyond its precise holding, but it also failed to appreciate that Coutu's rejection of a Davis-Bacon private right of action based upon Congressional intent behind the Davis-Bacon Act scheme applies with equal force to a section 1983 action. Compare Wilder, 496 U.S. at 509-11 (section 1983), with Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (most important factor in evaluating implied private right of action is congressional intent).

Other courts, indeed, have held that no implied right of action exists to

enforce contracts actually containing Davis-Bacon Act stipulations. United States v. Capeletti Bros., 621 F.2d 1309 (5th Cir. 1980) (no private right of action exists to recover wages on contract containing Davis-Bacon wage specifications even though private Miller Act bond remedy inapplicable) (cited with approval in Coutu, 450 U.S. at 772-73 n.23). Accord Weber v. Heat Control Co., 579 F. Supp. 346 (D.N.J. 1982), aff'd, 728 F.2d 599 (3d Cir. 1984).[13]

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[13] Compare McDaniel v. Univ. of Chicago, 512 F.2d 583, 585-86 (7th Cir.) (decided prior to Coutu, but finding implied right of private action), vacated & remanded, 423 U.S. 810 (1975), on remand, 548 F.2d 689 (7th Cir. 1977) (again finding an implied right of action under Davis-Bacon); but see Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1240 n.27 (7th Cir. 1980) (questioning McDaniel); Faerber Elec. Co. v. Atlanta Tri-Com, Inc., 795 F. Supp. 240, 244 n.2 (N.D. Ill. 1992) (McDaniel's holding that there was a private right of action under the Davis-Bacon Act "was overruled in Coutu").

In any event, Coutu is, in fact, directly on point, even though the Contracts here contained prevailing wage stipulations, because in setting the "Person Day Rate" below prevailing wage levels, HPD made, and CPC relied on, exactly the same predetermination present in Coutu -- i.e., that the Davis-Bacon Act prevailing wage requirements did not apply.[14] Now, however, under the Second Circuit's Opinion, employees have been blessed with a weapon to be used at will to void wage predeterminations and to

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[14] The CPC/City Contract terms and attached wage schedules are only conclusory restatements of section 5310 -- it remained up to the City to determine whether any actual prevailing wage obligation applied (e.g., whether respondents were "employed" by CPC, and whether the work to be performed was "construction work," on "residential property" of not less than "8 units"). See 42 U.S.C. § 5310(a); Coutu, 450 U.S. at 783-84; e.g., 1986-87 Contract Exhibit F (Nos. 1 and 2) (129, 137).

recover private damages even after all work under federally assisted contracts has been performed and all monies paid.

The Second Circuit has thus completely disregarded the unmistakable Congressional intent to strike a fair balance between the interests of employees and contractors. As emphasized in Coutu, the original Davis-Bacon Act did not provide for predetermination of prevailing wages nor any enforcement mechanism. 450 U.S. at 775. Thus, "[c]ontractors called for predetermination of prevailing wages, claiming that they had been put to unexpected expense by post-contract determinations that the prevailing wage was higher than the rate upon which they had based their bids." Id. Labor, on the other hand, called for an enforcement mechanism. Id. at 776.

In 1935, the Davis-Bacon Act was amended to provide for both:

> [T]he 1935 amendments added two key features to the Act: administrative predetermination of the minimum wages that the contractor must pay his laborers and mechanics, and a means whereby laborers and mechanics could recover back wages under a contract containing prevailing wage stipulations. The Act thus carefully balances the interests of contractors and their employees. The contractor is able to 'know definitely in advance of submitting his bid what his approximate labor costs will be,' S. Rep. No. 1155, at 2, while the laborer or mechanic is given a right of action to enforce the stipulated wages. To imply a private right of action to sue for Davis-Bacon wages under a contract that does not contain prevailing wage stipulations would destroy this careful balance.

Id. at 782.

In essence, the Second Circuit has now excised the Davis-Bacon procedures and balance of interests from the HCDA, short-circuited the elaborate enforcement scheme that had been placed in the hands of HUD, the Department of Labor and the

Attorney General, and put at risk badly needed housing projects by placing HCDA enforcement in the hands of private parties and their lawyers. Not only will contractors and public entities be subject to the risk and uncertainty of large damages and attorneys' fee awards, entire HCDA funded projects could be halted as plaintiffs seek and obtain injunctive relief to enforce their section 1983 rights. Indeed, "laborers and mechanics" could bring a private suit not just after the contracts are completed and all monies paid (as is the case here), *but at any time*, even during the pendency of the contract or while administrative proceedings or remedies are pending. A private right of action will thus utterly vitiate the Reorganization Plan and cripple Congress' desire to revitalize urban neighborhoods. Congress

clearly did not intend section 5310 to have such a devastating impact.

C. The 1974 And Current DOL Regulations Provide For A Comprehensive Enforcement Scheme

The extensive DOL regulations under the Reorganization Plan in effect when section 5310 was enacted in 1974, as well as during all relevant times, satisfy the Sea Clammers standard by setting out a comprehensive enforcement scheme. Prevailing wage enforcement occurs through labor standards investigations, inspections and audits, 29 C.F.R. §§ 5.5(a)(3), 5.6(a)(2), (3), 5.7(a)(2), 5.11(a) (1974); enforcement reports, 29 C.F.R. § 5.7(b) (1974); debarment, contract termination, and withholding, 29 C.F.R. §§ 5.6(b), 5.7(d), 5.9 (1974); "request[s]" for restitution of wages, 29 C.F.R. § 5.10(a) (1974); and referral of willful violations to the U.S. Attorney

General for criminal prosecution, 29 C.F.R. § 5.10(b) (1974).[15]

Employees, moreover, are able to initiate and gain administrative redress for prevailing wage violations by triggering an elaborate scheme to resolve wage disputes. They may request the DOL to make an "authoritative" ruling, and the DOL must then resolve "[a]ll questions" as to wage determinations, their application, or wage disputes. 29 C.F.R. §§ 5.12 (1974); 1.6(b), 5.13 (1992). Any ruling is appealable to the Wage Appeals Board. 29 C.F.R. Part 7 (1974) (1992). Indeed, the following provision must be included in each contract providing for resolution of all labor standards disputes, *including those between contractor and employee*:

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[15] See also 29 C.F.R. §§ 5.6, 5.7, 5.9, 5.10-5.12 (1992) (to the same effect).

> Disputes arising out of the labor standards provisions of this contract . . . shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 C.F.R. parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

29 C.F.R. § 5.5(a)(9) (1992).[16]

Furthermore, at the initial contracting stage, employees may directly participate as "interested person[s]" in a DOL-directed hearing on the specific application of prevailing wage requirements to the project before a hearing examiner, from which they may appeal as "interested person[s]" to the DOL Administrator and to the Wage Appeals

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[16] Similar clauses are included in each of the Contracts. See, e.g., 1986-87 Contract Exhibit F. (No. 2), Arts. 13, 14 (142).

Board. 29 C.F.R. §§ 1.10-1.16, Part 7 (1974).[17]

The contracting agency, under the 1974 regulations, could also initiate a hearing on prevailing wage disputes in which "all interested parties" received notice and could participate, after which findings of wages due would be made. 29 C.F.R. § 5.11(b) (1974). Any "interested person" could then appeal to the Solicitor of Labor and to the Wage Appeals Board. 29 C.F.R. §§ 5.11(b), Part 7 (1974). This hearing procedure may now be initiated not only by the contracting agency, but also by the DOL, on the employees' behalf, or by the contractor, or the subcontractor(s). 29

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[17] See also 29 C.F.R. §§ 1.8-1.9, Part 7 (1992) (providing that "[a]ny interested person may seek reconsideration of a wage determination" or its "application" to the DOL Administrator and the Wage Appeals Board).

C.F.R. § 5.11(a) (1992). After a full evidentiary hearing, employees may continue to allow the DOL to act on their behalf, or they may on their own behalf as an "interested person" appeal to the Wage Appeals Board. 29 C.F.R. § 7.2(b)(1) (1992).

Yet, the Second Circuit, in finding that a comprehensive scheme has not been set forth, emphasized that the regulations do not provide that employees may "initiate" the proceedings. (A19-20). The government, however, acts for and on behalf of the employees and is required to act under its own regulations whenever an employee brings a complaint, as it did

here.[18] Employees trigger the process and then have full participatory rights.

Thus, consistent with Congressional intent to balance contractor and employee interests, the 1974 and current Regulations permit no private action by employees. All of the powers under the HCDA have been placed squarely in the hands of either the contracting agency (here the City), HUD, DOL or the Attorney General in order to avoid a multiplicity of individual litigations brought by individual employees, members of the public or other third parties. See Coutu, 450 U.S. at 770 ("[T]he question

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[18] If the DOL does not act, laborers may be able to compel agency action and obtain limited judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. See Coutu, 450 U.S. at 761-62 n.10, and cases cited therein; see also International Union of Operating Eng'rs, Local 627 v. Arthurs, 355 F. Supp. 7, 14 (W.D. Okla.), aff'd, 480 F.2d 603 (10th Cir. 1973).

whether a statute creates a private right of action is ultimately 'one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law'" (quoting Touche Ross & Co., 442 U.S. at 578).

D. 42 U.S.C. § 5311(b)(2)'s Provision Of Civil Suits By The U.S. Attorney General To Recover Improperly Expended HCDA Funds Precludes Any Private Right Of Action Against An HCDA Recipient Under 42 U.S.C. § 1983

Under section 5311(a), HUD may terminate and limit HCDA payments to a "recipient of assistance" upon a finding "that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter." 42 U.S.C. § 5311(a). Section 5311(b) provides further for civil suit by the Attorney General.

Thus, pursuant to section 5311(b), the City, as the "recipient" of HCDA funds,

is subject to civil suit commenced by the Attorney General after referral of the matter by HUD. CPC may also be subject to civil suit under this provision. See Dixson, 465 U.S. at 487 (holding private community organization which contracted with city to administer HCDA funds was a recipient of federal block grant funds).

The Davis-Bacon Act administrative scheme is fully served by this enforcement mechanism -- since HUD must first refer the matter to the Attorney General. See Davis v. United States Dep't of Housing and Urban Dev., 627 F.2d 942, 946 (9th Cir. 1980) (referral under 42 U.S.C. § 5311(b) "is a matter for the agency's initial determination"). After referral, the Attorney General may proceed to impose both criminal and civil liability. Again, it is clear that the Sea Clammers/Smith standard has been met. See, e.g., Sea Clammers, 453 U.S. at 13

(government had authority to issue compliance orders, bring civil suits, and seek civil and criminal penalties).

II.

THE SECOND CIRCUIT'S OPINION CONFLICTS WITH SUTER BY HOLDING SECTION 5310 CREATES A COGNIZABLE FEDERAL "RIGHT" TO BE PAID PREVAILING WAGES

Section 1983 is not a procedural vehicle to redress all violations of federal laws, only those violations that implicate rights, privileges and immunities. Suter, 112 S. Ct. at 1367 ("we caution that '"Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law"'" (quoting Wilder, 496 U.S. at 509)). Thus, a private "federal right" enforceable under section 1983 exists only where "'the provision in question was intend[ed] to benefit the putative plaintiff,'" Wilder, 496 U.S. at 509, and "unambiguously confer[s] an

enforceable right upon the Act's beneficiaries." Suter, 112 S. Ct. at 1370 (holding that the Adoption Act does not "unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family." Id. at 1367).

Yet, the "primary objective" of Title I of the HCDA, as stated in Dixson, is "'the development of viable urban communities,'" 465 U.S. at 486, quoting 42 U.S.C. § 5301(c), which expressly provides:

> The primary objective of this chapter . . . is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.

The HCDA is thus not a wage statute enacted for respondents' benefit, but rather provides federal funds intended for the benefit of urban dwellers of low and moderate income.

Respondents are, therefore, only indirect non-intended beneficiaries of the provision to the City of HCDA funds pursuant to Congress' spending power. But, as emphasized in Suter, simply gaining a statutory benefit (especially an indirect one) is not sufficient to rise to the level of a right. See Suter, 112 S. Ct. at 1367 (finding no § 1983 private right even though children were intended "beneficiaries").

The Second Circuit therefore erred in rejecting the holding in Coutu that the Davis-Bacon Act does not confer rights on laborers and mechanics, but, rather, conveys only an indirect benefit from obligations imposed on federal agencies:

> Congress, rather than drafting the legislation "with an unmistakable focus on the benefited class,'" instead has framed the statute simply as a general prohibition or a command to a federal agency. Section 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals . . . § 1 is simply 'phrased as a directive to federal agencies engaged in the disbursement of public funds.'

450 U.S. at 772 (citations omitted); see also Capeletti Bros., 621 F.2d at 1314 ("benefits flowing to laborers and mechanics are derived indirectly and not as a result of any right conferred directly upon their class").

Indeed, as stated in Coutu:

> [t]he [Davis-Bacon] Act was 'designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.' . . . The purpose of the bill was 'simply to give local labor and the local contractor a fair opportunity to participate in this building program.'

450 U.S. at 773-74.

Moreover, the use of the phrase "shall be paid" in section 5310 does not "unambiguously confer" a right given the HCDA statutory scheme. Suter emphasized that in discerning Congressional intent, the entire statutory scheme must be considered:

> In both Wright [v. Roanoke Redevelopment and Housing Auth., 479 U.S. 418 (1987)] and Wilder the word 'reasonable' occupied a prominent place in the critical language of the statute or regulation, and the word 'reasonable' is similarly involved here. But this, obviously, is not the end of the matter. The opinions in both Wright and Wilder took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'enforceable rights, privileges, or immunities within the meaning of § 1983.'

112 S. Ct. at 1367 (citation omitted).[19]

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[19] See also Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Dev., 799 F.2d 774 (1st Cir. 1986) (under entire structure of HCDA, no private right of action exists to enforce the nondiscrimination provi-

(continued...)

Here, under the analysis in Suter, no private right of action can be found in light of (a) section 5310's plain language adopting the Davis-Bacon Act's comprehensive scheme, (b) the failure to include even the limited Miller Act remedy, (c) the Congressional intent to balance contractor and employee interests, (d) the unified enforcement and certainty gained through the Reorganization Plan and the DOL administrative regulations thereunder, and (e) since the HCDA was enacted under Congressional spending powers for the benefit of urban dwellers.

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[19](...continued)
sion of the HCDA, 42 U.S.C. § 5309(a) (i.e., that no person "shall" be discriminated against)).

III.

THE SECOND CIRCUIT UNFAIRLY HELD CPC TO BE A STATE ACTOR IN CONFLICT WITH RENDELL-BAKER AND THIS COURT'S GENERAL PRINCIPLES FOR FINDING STATE ACTION; CPC DID NOTHING MORE THAN AGREE TO A CONTRACT PRICE UNILATERALLY SET BY THE CITY

The precise factual issue here has not previously been addressed by this Court -- namely, whether a private contractor fairly becomes a state actor when it simply enters into a contract with a municipality at a contract price for the payment of labor -- a "Person Day Rate" -- set by the municipality so low as to make it financially impossible to pay prevailing wages. The Second Circuit's Opinion finding state action by CPC, however, conflicts with the general principles set forth in Rendell-Baker v. Kohn, 457 U.S. 830.[20]

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[20] See Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991) ("Although we have recognized that this aspect of the analysis [i.e., (continued...)

The principle set forth in Rendell-Baker controls here:

> [a] school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. *Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.*

Id. at 840-41 (emphasis added). Indeed, this Court has stated a rigorous threshold for CPC, as a private party, to fairly become a state actor, which has not been met:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law.

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[20](...continued)
"whether a private litigant in all fairness must be deemed a government actor"] is often a factbound inquiry, see Lugar [v. Edmondson Oil Co.], 457 U.S. at 939, our cases disclose certain principles of general application").

United States v. Classic, 313 U.S. 299, 326 (1941); see also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [private party] so that the action of the latter may be fairly treated as that of the State itself").

Despite the coercive effect attributed to the "Person Day Rate" by the Second Circuit, it is, in reality, nothing more than a mathematical calculation used by the City to arrive at a total contract price and to pay out funds. CPC had no role in determining the "Person Day Rate" and simply entered into a contract at that price. Such action cannot convert CPC into a state actor even if CPC received such public funds as its total and exclusive reimbursement for program

work. See Rendell-Baker, 457 U.S. at 840 (rejecting section 1983 claim even though "virtually all of the school's income was derived from government funding").

The Second Circuit's reasoning, moreover, is circular and thus fundamentally flawed (i.e., because the "Person Day Rate" resulted in a purported prevailing wage violation, state action by CPC necessarily exists). In effect, a purported underlying substantive prevailing wage violation has been bootstrapped into state action. Compare Rendell-Baker, 457 U.S. at 838 ("[t]he core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action"); Flagg Bros. v. Brooks, 436 U.S. 149, 155-56 (1978).

Thus, under the Second Circuit's flawed analysis, any contract between a public entity and a private party in which the public entity unilaterally sets vital terms of the contract is converted into state action. Private contractors now risk section 1983 liability simply by contracting with a public entity, despite this Court's holding in Rendell-Baker. The Second Circuit's decision, if allowed to stand, would therefore utterly obliterate the "essential dichotomy" between public and private acts. Jackson, 419 U.S. at 349.[21]

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[21] The Second Circuit, in holding CPC to be a state actor, also misapplied the "coercive power" and "significant encouragement" language taken from San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987) (holding U.S. Olympic Committee not to be a governmental actor), which, after all, was taken from Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), and Rendell-Baker, 457 U.S. at 840 -- both of which, on their facts, found no state action by the private party.

In addition, since CPC simply paid respondents in accordance with the "Person Day Rate," as required by the contract and the City's determination, mistaken or otherwise, that no prevailing wage requirement applied, no liability under section 1983 can be imposed on CPC even if the mandated payment of respondents' wages pursuant to the funding rate were held to be a violation of section 5310. See Monell v. Dep't of Social Services, 436 U.S. 658, 691-95 (1978) (section 1983 does not create a cause of action for vicarious liability for deprivation of rights); Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940) (private contractor simply acting in accordance with contract with U.S. Government not liable for alleged constitutional injury caused by its actions); O'Grady v. City of Montpelier, 474 F. Supp. 186, 187-88 (D. Vt. 1979)

(private contractor not liable under section 1983 for merely performing in accordance with terms of municipal contract). Indeed, in ignoring this body of law, the Second Circuit incredibly conceded that CPC was being held vicariously liable for the City's (not CPC's) breach of official duty to properly determine that prevailing wages be paid:

> In sum, the facts alleged would suffice to permit a finding that HPD effectively required CPC to pay less than the minimum wages required by § 5310, *that the actions of CPC in paying those subminimum wages were the responsibility of the municipal defendants*, and that CPC's conduct was therefore state action.

(A23) (emphasis added).

IV.

IN SETTING THE "PERSON DAY RATE," THE CITY EXERCISED DELEGATED FEDERAL AUTHORITY FOR ENFORCING PREVAILING WAGE STANDARDS

The Second Circuit also ignored this Court's established precedent that when

state officials act solely pursuant to federal authority, they act under color of federal, but not state, law and are not subject to section 1983. Wheeldin v. Wheeler, 373 U.S. 647, 650 n.2 (1963). The City, in contracting with CPC at the "Person Day Rate," acted solely pursuant to its delegated federal authority to determine and enforce prevailing wage standards (i.e., in capping the "Person Day Rate" and thus, the total contract price, at a level insufficient for CPC to pay prevailing wages, HPD determined that no federal prevailing wage obligation existed). See Coutu, 450 U.S. at 759 n.6 (contracting agency has "primary responsibility" for Davis-Bacon enforcement); 29 C.F.R. §§ 5.6(a)(1) (1974); 1.6(a)(2)(b) (1992).

Indeed, in enforcing prevailing wage standards, the federal government (through both DOL and HUD) has not only

overall responsibility, but also overlapping day-to-day responsibility and control with the City.[22] Significantly, no state law prevailing wage obligations whatsoever were imposed on CPC -- any

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[22] See, e.g., 1986 Handbook of HUD ¶ FOREWORD ("In . . . the Community Development Block Grant programs, HUD has delegated to local and State agencies certain ministerial responsibilities to enforce labor standards. HUD at the same time, however, retains overall responsibility for ensuring that local and State agencies properly carry out their enforcement responsibilities"); ¶ 104 ("HUD has delegated certain of the day-to-day enforcement responsibilities [for labor standards compliance to state and local agencies] . . . which directly administer HUD-assisted programs."); 1987 DOL Field Operations Handbook at Chapter 15a00(b) ("Under Reorganization Plan No. 14 of 1950 . . . the Federal contracting or other administering agency has the primary responsibility for the enforcement of the DBRA/CWHSSA labor standards provisions included in its contracts. The Secretary of Labor (S/L) has coordination and oversight responsibilities including the authority to investigate labor standards compliance as warranted."); 29 C.F.R. Part 5 (1992).

purported prevailing wage obligation arose purely under federal law.

This Court in Dixson, moreover, held that officers of a private social service corporation just like CPC, which administered HCDA block grant funds pursuant to an agreement with a municipality, "act[ed] for or on behalf of the United States" within the meaning of the federal bribery statute, 18 U.S.C. § 201. 465 U.S. 482. While Dixson arises under a criminal statute, not section 1983, its holding and conclusions govern the federal character of the City's actions here because, according to the Court, they "turn[ed] on the relationship between [the private] petitioners and the Federal Government." Id. at 486.

In holding the corporation's officers to be federal actors "with official federal responsibilities," id. at 496,

the Court emphasized the substantial federal control over HCDA block grant funds provided to localities, as it "creates a 'consistent system of Federal aid.'" Id. at 486 (citing 42 U.S.C. § 5301(d)). The Court concluded that the federal government "retain[s] federal control to assure compliance with statutory federal objectives and implementing regulations . . . and to recover improperly expended funds. § 5311(b)(2)." Id. at 487 (citing to the HCDA's imposition on recipients of financial accountability, equal opportunity, fair labor and environmental requirements).

Thus, the Court stated, "While the HCDA addressed a national problem, Congress enacted the legislation as a federal block grant statute, under which the day-to-day administration of the federal program, including the actual

expenditure of federal funds, is delegated to state and local authorities." Id. at 486. It then held:

> Given the *structure of the HCDA program and petitioners' responsible positions as administrators of the subgrant*, we have little difficulty concluding that these persons served as public officials for purposes of § 201(a). As executives of UNI, *petitioners had operational responsibility for the administration ~~of the HCDA~~ grant program* within the city of Peoria. In *allocating the federal resources made available to the city through the HCDA grant program, petitioners were charged with abiding by federal guidelines, which dictated both where and how the federal funds could be distributed.* By accepting the responsibility *for distributing these federal fiscal resources,* petitioners assumed the *quintessentially official role of administering a social service program established by the United States Congress.*

Id. at 496-97 (emphasis added).

Respondents' section 1983 claim involves federal action, and not state action. Accordingly, as a matter of law, it cannot stand.

CONCLUSION

WHEREFORE for the reasons stated, we request that the Court grant this petition for writ of certiorari.

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Respectfully submitted,

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